IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL REVISION APPLICATION NO. 50 OF 2006

Vilas Bablo K. Naik,
S/o K. Naik,
R/o H. No.2056,
Housing Board,
Bicholim, Goa. ... Applicant

versus

S T AT E ... Respondent

Mr. Nitin Sardessai, Advocate for the Applicant.

Mr. C. A. Ferreira, Public Prosecutor for the State.

CORAM : N. A. BRITTO, J.

DATE : 10TH NOVEMBER, 2006.

ORAL JUDGMENT

In this revision, the accused takes exception to the Order dated 8-9-2006 of the learned Assistant Sessions Judge, Panaji, directing framing of charges against the accused under Section 376/511, 342 and 506(ii) I.P.C.

2. The accused was prosecuted by Mapusa Police Station on a chargesheet filed under Sections 376, 342 and 506(ii) I.P.C. and since the offence under Section 376 I.P.C. was triable by the Court of Sessions, the case was committed. It appears that arguments before framing of charge were heard. The learned Assistant Sessions Judge, framed two points for his determination.

3. The first was whether the prosecution had made out a prima facie case that the accused raped the complainant and although the learned Assistant Sessions Judge answered the point in the affirmative, the learned Assistant Sessions Judge came to the conclusion that the offence disclosed was one of attempt to commit rape punishable under Section 376/511 I.P.C. The learned Assistant Sessions Judge also framed another point, namely whether the prosecution had proved prima facie that the accused had wrongfully confined and threatened the complainant and answered the same in the affirmative. As far as the second point is concerned, i.e. the framing of charges under Section 343 and 506(ii), no serious dispute has been raised on

behalf of the accused nor any such dispute could be raised considering the material produced by the prosecution. In any event, it must be held that the prima facie finding on point (b) of the learned J.M.F.C. to the extent that the learned J.M.F.C. has also directed the framing of charges under Section 342 and 506(ii) I.P.C., could not be faulted.

4. The question before the Court is whether the learned Assistant Sessions Judge was at all justified in proceeding to order the framing of charge under Section 376/511 I.P.C. At this very stage, it may be noted that although the chargesheet was filed for an offence under Section 376, the learned Assistant Sessions Judge has chosen not to frame any charge under the said Section but has chosen to frame a charge for attempt under Section 376/511 I.P.C. and the prosecution has raised no grievance about it.

5. To answer the said question, bare facts appearing on the chargesheet and the documents produced along with it are required to be noted. There is no dispute that the victim is aged 15 years and in any event, at the time of commission of the

alleged offences, she was below 16 years of age. The victim was working as a maid servnt with one Sheila Camilo, a divorcee, who was residing in the house of her uncle Santan Camilo, who is separated from his wife and while the latter was on service on board the ship, the victim and the said Smt.Camilo appear to have been the only persons residing in the said house. It appears that two complaints came to be filed against the accused who is a Doctor by profession. The complaint filed by the victim was registered under crime no.199/2003 and the complaint filed by the said Smt. Sheila Camilo, came to be registered under Crime No.200/03. It has been stated on behalf of the accused that chargesheet was filed and the case was closed pertaining to the said complaint of Smt. Sheila Camilo registered under Crime No.199/03. This Court would not be concerned with the said case but what is required to be noted is that certain naked photographs of the victim, except for the knicker she was wearing, were produced by Sheila Camilo, having been taken by the accused of the victim and the same having been found by her in the bag of the accused.

6. The complaint of the victim came to be filed on or

about 23-6-2003, in respect of four incidents of alleged rape, which had taken place just before Christmas of the year 2002 and January, 2003. After the said complaint was registered, the victim and the accused were got medically examined. The medical examination of the victim prima facie shows that she was of the stated age of 15 years. The medical examination disclosed that her hymen was thick, fleshy, fimbriated with no fresh or old tears and the hymenal opening admitted only the tip of the finger and the hymen was intact. There was no congestion or edema or tenderness. Dr. Rodrigues, Associate Professor in the Department of Forensic Medicines, G.M.C., has concluded that there was no physical evidence of sexual intercourse and there were also no injuries on the body of the victim. The medical examination of the accused also did not disclose anything in particular in that there were no positive signs of recent sexual intercourses though it was opined that there was nothing to suggest that the accused was incapable of sexual intercourse.

7. Presumably, the report of Dr. Rodrigues in relation to the victim baffled the investigating officer, who recorded her

supplementary statement on 24-6-2003 and in this supplementary statement, the victim stated that every time the accused raped her, his penis did not insert in her vagina and she did not get bleeding any time whenever he had sex with her.

8. At the time of examination of the victim on 24-6-2003, vaginal swabs and smear slides were taken by Dr. Rodrigues and subsequently when they were sent for analysis to the C.S.F.L., it was disclosed that the test was positive i.e. semen was detected. As regards this aspect, the learned trial Court referred to Medical Jurisprudence and Toxicology by Parikh, wherein at page 644 of the Fifth Edition, it was opined that the sperms generally remain motile in the vaginal canal for about two to three hours and non motile sperms are detectable for about 24 hours and that the sperms may remain alive in the uterine cavity for three to five days. Non-motile forms may be found in the female genital tract for about 3 weeks to 3 months after death. The learned Assistant Sessions Judge noted that as per the victim, the last incident had taken place sometime in January, 2003 and the victim was medically examined and her vaginal swabs were taken on 24-6-2003, i.e. after a period of

more than five months. The learned Assistant Sessions Judge also noted that in the supplementary statement, the victim had admitted that there was no penetration during the alleged sexual abuse and therefore, it was difficult to believe that the test could be positive, after a period of five months, and this fact raised a serious doubt about the case of prosecution. Prima facie, this view of the learned Assistant Sessions Judge, could not be faulted and it appears that there has been a serious gaffe somewhere, of which the accused would be certainly entitled to take advantage of.

9. The question still remains whether the learned Assistant Sessions Judge having declined to frame a charge under Section 376 I.P.C. was justified in framing a charge under Section 376/511 I.P.C. In not framing the charge under Section 376 I.P.C. against the accused, the learned Assistant Sessions Judge observed that in view of the statements made by the victim, the photographs produced and the positive report of medical examination, it could not be said that the prosecution had made out a prima facie case. The learned Assistant Sessions Judge then referred to the explanation to Section 375 I.P.C. and

observed that for committing the offence of rape, penetration was necessary since in this case, there was no penetration, the offence of rape was not disclosed. In other words case of the prosecution in relation to Section 376 I.P.C. has not been accepted by the learned Assistant Sessions Judge as inherently improbable in the light of supplementary statement of the victim and the medical evidences.

10. Nevertheless, the learned Assistant Sessions Judge proceeded to observe that there was sufficient evidence to show that the accused had removed the clothes of the victim and his clothes, had on one occasion tied the complainant, had pushed her on bed and had sexually abused her and this evidence disclosed that the accused had only stopped short of penetration and therefore, prima facie, the evidence disclosed that the accused had committed all the acts necessary to commit the rape only that the accused did not take the last step and therefore the accused had attempted to commit rape.

11. On that aspect, the learned Counsel on behalf of the accused had placed reliance on the case of **Aman Kumar and**

another v. **State of Haryana**(2004(4) SCC 379), while the learned Public Prosecutor has placed reliance on 1993(2) ALL ER 190 and **Madan Lal** v. **State of J & K**(1997) 7 SCC 677). Relying on **State of Maharashtra** v. **Priya Sharan Maharaj** and others (1997) 4 SCC 393), the learned Public Prosecutor has submitted that while making a complaint to the police or giving their statements, the victim were not required to give detailed explanations.

12. The parameters required to be applied at the stage of framing of charge are well settled. In **State of Maharashtra and another** v. **Som Nath Thapa and others**((1996) 4 SCC 659), the Apex Court speaking through three learned Judges, stated that at that stage, the Court is required to consider the question of framing charge by applying the test of prima facie case. The Court further held that a more clear statement on the law would be that if there is grounds for presuming that the accused has committed the offence, a Court can justifiably say that a prima facie case against him exists and so frame a charge against him for committing that offence and that the Court on the basis of materials on record should come to the conclusion that the

commission of the offence is a probable consequence and if that is the case, a case for framing of charge exists. To put it differently, observed the Supreme Court, that if the Court were to think that the accused might have committed the offence, it can frame the charge, though for conviction the conclusion is required to be that the accused has committed the offence and at the stage of charge, the probative values of the materials cannot be gone into and the materials brought on record by the prosecution have got to be accepted as true at that stage. In coming to that conclusion, the Apex Court referred to another decision of three Judges in the case of **R. S. Nayak v. A. R. Antulay**((1986) 2 SCC 716).

13. In **Shree Atyachar Virodh Parishad** v. **Dilip Nathumal Chordia and another**((1989) 1 SCC 715), referring to Section 227 of the Code, the Apex Court referred to the expression 'ground' in Section 227 and observed that the 'ground' in the context is not a ground for conviction, but a ground for putting the accused on trial and therefore, the Court need not undertake an elaborate inquiry in sifting and weighing the materials and all that the Court is required to consider is

whether evidentiary material on record, if generally accepted, would reasonably connect the accused with the crime.

14. In **State of Maharashtra** v. **Priya Sharan Maharaj and others**(supra), the Apex Court stated that at the stage of Section 227 and 228, the Court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence, and the Court may, for this limited purpose, sift the evidence and it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case. At the stage of framing charge, the Court has to consider the material with a view to find out if there is ground for presuming that the accused has committed the offence or that there is no sufficient ground for proceeding against him and not for the purpose of arriving at the conclusion that it is not likely to lead to a conviction. What the Court has to consider at that stage is whether the version of the person complaining together with his/her explanation is prima facie believable or not. In **State of**

M.P. v. S. B. Johari and others((2000) 2 SCC 57), the Apex Court has reiterated that at that stage, the Court is not required to appreciate the evidence and arrive at the conclusion that the materials produced are sufficient or not for convicting the accused.

15. Reverting to the complaint of the victim, the victim has stated that for about a year the accused had started coming, holding her and hugging her from behind and even started touching her breast and pressing the same and he had told him on several occasions not to do such kind of things but he never listened and he used to do the above things mostly during the night time when no one was around and he told her not to tell anyone regarding those things saying that he would inject and kill her and therefore she did not tell anyone due to his fear. As per her, the first incident took place just before Christmas in the year 2002 on one day at about 1900 hours when she was in the bedroom doing her household work and on that day the accused was present in the house from 1700 hours when he came into the bedroom and closed the door and she tried to shout but he caught hold of her mouth and gave a slap on his face threatening

her not to shout or else he would kill her and she got scared and kept quite and this happened on the first floor of the house when the said Smt. Sheila Camilo was asleep in the bedroom on the ground floor as the accused had already given an injection to her. She has stated that "he then forcibly pushed me on the bed and thereafter removed all my clothes warning me not to shout. He then raped me for about half an hour" and then he went out of the bedroom and stayed for over night in the house. The second incident is stated to have been taken place after 8 days of the first incident and on this occasion, she stated that the accused raped her for about 20 minutes after forcibly removing the pant of her churidar which she was wearing and also her underwear and after pushing her on the bed. The third incident is stated to have taken place 4 days later on which day it is stated by her that the accused came to the balcony where she was, closed the bedroom door and threatened to kill her and at this time the accused was having a camera in his hand and thereafter the accused tied his hands by a piece of cloth and then tied an iron chain around her waist and tied her to the grill, trying to remove her clothes which the accused tore and took her photographs and thereafter pushed her on the bed,

removed her underwear and raped her for about half an hour and after putting his clothes the accused went out of the house and did not return back. The fourth incident is stated to have taken place in the month of January, 2003 after 7 days of the third incident when the accused is stated to have come at about 1600 hours, went with Sheela in her bedroom and gave an injection after which she went to sleep and at about 1700 hours the accused forcibly removed her clothes, pushed her on the bed and forcibly raped her for about 30 minutes and then he wore his clothes which he had removed before raping her and went away and she too put her clothes and kept quite as the accused had threatened her with dire consequences from time and again not to disclose the incident to anyone.

16. On behalf of the accused, the learned Counsel has submitted that once it is held that Section 376 I.P.C. was not attracted there is no material on record to frame a charge under Sections 376/511 I.P.C. The learned Counsel further submits that the complainant's case appears to be self contradicting and inherently improbable in the light of her supplementary statement subsequently recorded. The learned Counsel further

submits that in case the accused wanted to commit rape upon the said victim there was nothing to prevent him and therefore the surrounding circumstances do not spell out a case of attempt to rape to justify the framing of charge under Sections 376/511 I.P.C. The learned Counsel contends that there was nobody to stop the accused from doing the inevitable act if at all the accused wanted to commit rape on the victim as there was no one to intervene in any one of the four occasions mentioned by the victim. It is the contention made on behalf of the accused that once the offence of rape has been held as prima facie not made out, the facts do not disclose a case for attempt to rape punishable under Sections 376/511 I.P.C. to justify the framing of charge against the accused. It is also submitted by the learned Counsel that in case he is discharged under Sections 376/511 I.P.C. then the matter will have to go for trial to a Judicial Magistrate and it cannot be directed to be tried by an Assistant Sessions Judge since in that event the accused would be prejudiced in his right to appeal. The learned Counsel has submitted that the victim probably did not know what rape was and according to her the indecent assault as alleged by her was rape committed by the accused.

17. On the other hand, the learned Public Prosecutor Mr. C. A. Ferreira submitted that though there might have not been penetration, as stated by her in her supplementary statement or as otherwise opined by Dr. Rodrigues the accused had committed sufficient acts which would amount to attempting the commission of rape. The learned Public Prosecutor further submits that the supplementary statement of the victim that there was no penetration does not imply that there was no rape as otherwise stated by her in her complaint and what exactly the victim meant by the expression "rape" as described by her in her complaint would be difficult to be ascertained at this stage and that position could be ascertained at the trial when the victim is examined. As per the learned Public Prosecutor, the trial Court has rightly considered all the material available and has come to a correct conclusion that the material produced justifies the framing of charge under Sections 376/511 I.P.C. and therefore this Court ought not to interfere with the said order in revisional jurisdiction.

18. Intention, preparation and attempt are the three

stages prior to the commission of actual offence. The first two stages are not made punishable by the Indian Penal Code but an attempt is generally made punishable under Section 511 I.P.C. which provides that whoever attempts to commit an offence punishable by this Code with imprisonment for life or imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code for the punishment of such attempt, be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence, or with such fine as is provided for the offence, or with both.

19. The expression "attempt" has not been defined by the Penal Code and therefore it will have to be taken in its ordinary meaning. The word "attempt" was defined in Criminal Attempts Act, 1981 as follows:-

> "Where, any proceedings against a person for an offence

> under Section above, there is no evidence sufficient in law to support a finding that he did an act falling within sub-section(1) of that Section, the question whether or not his act fell within that sub-section is a question of fact".

20. With reference to the said definition the Court of Appeal consisting of three Law Lords in Attorney Generals Reference(No.1 of 1992)((1993) 2 ALL ER 190), relied upon by the learned Public Prosecutor, stated thus:-

> "It is not, in our Judgment, necessary, in order to raise a prima facie case of attempted rape, to prove that the defendant with the requisite intent had necessarily gone as far as to attempt physical penetration of the vagina. It is sufficient if there is evidence from which the intent can be inferred and there are proved acts which a jury could properly regard as more than merely preparatory to the commission of the offence. For example, and merely as an example, in the present case the evidence of the young woman's distress, of the state of her clothing, and the position in which she was seen, together with the

> respondent's acts of dragging her up the steps, lowering his trousers and interfering with her private parts, and his answers to the police, left it open to a jury to conclude that the respondent had the necessary intent and had done acts which were more than merely preparatory. In short that he had embarked on committing the offence itself".

21. In the present case, the evidence of the young woman's distress, of the state of her clothing, and the position in which she was seen, together with the respondent's acts of dragging her up the steps, lowering his trousers and interfering with her private parts and his answers to the Police, left it open to a jury to conclude that the respondent had the necessary intent and had done acts which were more than merely preparatory. In short that he had embarked on committing the offence itself.

22. It may be noted that in the aforesaid case, the accused was caught literally with his pants down and was questioned by the Police and amongst other things it was also

found that there was bruising of the complainant's private parts which corresponded to the bruising of the respondent's penis.

23. In the case of **Madan Lal** v. **State of J & K**((1997) 7 SCC 677), relied upon by the learned Public Prosecutor, the Apex Court observed that the difference between preparation and an attempt to commit an offence consists chiefly in the greater degree of determination and what is necessary to prove that an offence of an attempt to commit rape has been committed is that the accused has gone beyond the stage of preparation. If an accused strips a girl naked and then making her lie flat on the ground undresses himself and then forcibly rubs his erected penis on the private parts of the girl but fails to penetrate the same into the vagina and on such rubbing ejaculates himself then it cannot be held that it was a case of mere assault under Section 354 I.P.C. and not an attempt to commit rape. In other words, it is very clear from the aforesaid observations that for an offence to be an attempt it has to go beyond the stage of preparation. The Apex Court in the case of **Aman Kumar and another** v. **State of Haryana** ((2004) 4 SCC 379) relied upon by the learned Counsel of the

accused observed that in order to find an accused guilty of an attempt with intent to commit a rape, the Court has to be satisfied that the accused, when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person, but that he intended to do so at all events, and notwithstanding any resistance on her part. Indecent assaults are often magnified into attempts at rape. In order to come to a conclusion that the conduct of the accused was indicative of a determination to gratify his passion at all events, and inspite of all resistance, materials must exist. Surrounding circumstances many times throw beacon light on that aspect. Referring to the facts of that case, the Apex Court noted that there was no material to show that the accused were determined to have sexual intercourse in all events and in that background the offence could not be said to be an offence to commit rape to attract culpability under Sections 376/511 I.P.C. but the case certainly was one of indecent assault upon a woman punishable under Section 354 I.P.C.

24. Reverting back to the ordinary meaning of the words "attempt", attempt as per Concise Oxford English Dictionary

means make an effort to achieve or complete, try to climb to the top of a "mountain". As per Black's Law Dictionary an attempt ordinarily means an intent combined with an act falling short of the thing intended. It may be described as an endeavor to do an act, carried beyond mere preparation, but short of execution. In Criminal Law it means an intent to commit a crime coupled with an act committed towards commission of offence. An effort or endeavor to accomplish a crime, amounting to more than mere preparation or planning for it, if not prevented, would have resulted in the full consummation of the act attempted for which in fact does not bring to pass the party's ultimate design and the requisite elements of an "attempt" to commit a crime are: (1) an intent to commit it, (2) an overt act towards its commission, (3) failure of consummation, and (4) the apparent possibility of commission. As stated by the Apex Court for an offence to be an attempt, an act has to go beyond the stage of preparation. In other words, after the preparations are complete the culprit should commence to do something with an intent of committing the offence and which is the step towards the commission of the offence and once a culprit commences to do such an act with the necessary intention he commences his attempt to commit the

offence. In the case at hand, there was nothing which could have prevented the accused to have committed the offence of rape upon the victim if he so desired and this circumstance which ought to have thrown a beacon of light, appears to have been ignored by the trial Court.

25. Once the offence of rape was held as prima facie not proved, in the light of the supplementary statement recorded of the victim and in the light of the medical evidence there was no material to come to the conclusion that the accused had proceeded any further in an attempt to commit the offence after the accused had forcibly undressed the victim or himself as narrated by her in her complaint. In other words, her statements do not reflect that the accused had done any overt act/s towards the commission of offence. Nothing prevented the accused to commit rape if he wanted to. The accused does not appear to have produced any further from the stage of preparation. Considering the facts of the case, the learned trial Court was not justified, after excluding that the offence of rape was not committed to come to the conclusion that the acts of the accused amounted to an attempt to rape. The learned trial Court

therefore was not justified in ordering the framing of charge under Sections 376/511 I.P.C.

26. Consequently, this revision deserves to succeed partly. The learned trial Court is therefore hereby directed to frame the charge/s against the accused under Sections 342 and 506 I.P.C. and remit the case for trial in accordance with Section 228 Cr.P.C.

27. Revision partly allowed.

N. A. BRITTO, J.

arp/*RD